

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:12-CR-254 JCM (PAL)

Plaintiff(s),

ORDER

v.

ALBERT SILVA HERNANDEZ, JR.,

Defendant(s).

Presently before the court is defendant Albert Silva Hernandez, Jr.'s unopposed motion for hearing in absentia. (Doc. # 104).

On April 24, 2013, this court entered a jury verdict against Mr. Hernandez. (Doc. 46). The jury found Mr. Hernandez guilty of counts one through eight. (*Id.*). The jury found Mr. Hernandez not guilty of counts nine through eleven. (*Id.*). On August 5, 2013, this court sentenced Mr. Hernandez to 284 months confinement for each count, to run concurrently. In addition, the court imposed lifetime supervised release against Mr. Hernandez, for each count, to run concurrently.

On August 14, 2013, Mr. Hernandez filed a notice of appeal with respect to both the court's disposition and the sentencing. On May 26, 2015, the United States Court of Appeals for the 9th Circuit filed a memorandum affirming the case's disposition, but remanding the sentencing aspect of the case to this court for consideration of whether the post-sentencing 9th Circuit opinion in *United States v. Roybal* has any effect on this court's decision to apply a two-level distribution enhancement under U.S.S.G. § 2G2.1(b)(3). *See United States v. Roybal*, 737 F.3d 621 (9th Cir. 2013).

1 After remand, the court scheduled a hearing for the parties to argue whether application of
2 the sentencing distribution to Mr. Hernandez' crimes was appropriate, which has been continued
3 to October 5, 2015, at 11:00 A.M. Mr. Hernandez argues in his instant motion that under Federal
4 Rule of Civil Procedure ("FRCP") 43, his presence is not required at the hearing and that the court
5 should, therefore, excuse his absence. *See* FED.R.CIV.P. 43(b)(3).
6

7 FRCP 43(b) states that a defendant need not be present when, *inter alia*, "[t]he proceeding
8 involves only a conference or hearing on a question of law." FED.R.CIV.P. 43(b)(3). Here, the only
9 question is the applicability of a 9th Circuit case to the defendant's facts. This is a pure question
10 of law. Furthermore, Mr. Hernandez is allegedly recovering from reconstructive shoulder surgery
11 at MCFP Springfield in Missouri. His counsel indicates that he will soon begin physical therapy
12 and that those rehabilitation efforts would be frustrated by transfer to this district for the hearing.
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14 The government does not oppose Mr. Hernandez's motion for a hearing in absentia. Based
15 on the foregoing, this court does not find any reason that the October 5th hearing cannot go forward
16 in absentia with respect to defendant Hernandez.
17

18 Accordingly,

19 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Albert Silva
20 Hernandez, Jr.'s unopposed motion for hearing in absentia be, and the same hereby is, GRANTED.
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22 DATED September 15, 2015.

23 
UNITED STATES DISTRICT JUDGE
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